IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.209/2003

1. Mr. Jerry Alex Braganza alias
Jeronimo Oriculo Alex Braganza,
major of age, businessman ; and
landlord;

2. Mrs. Lavina C. Braganza,
daughter of Leo Pinto, of
major age, housewife,
both residing at Angod,
Mapusa, Bardez, Goa. ... Petitioners.

V/s.

1. Smt. Rajeshree alias Rayeshri
Ramdas Borkar alias Shobhavati
Ramdas Borkar of major age,
married, housewife,

2. Shri Ramdas Satu Borkar
(expired) represented by his LRs.
2a. Ms. Sandhya R. Borkar,
2b. Mr. Samir R. Borkar,
2c. Mr. Sachin R. Borkar,
all majors of age, and resident of
House No.75, Orulem, Vasco Goa.

3. M/s. Rijim Builders,
through its Proprietor,
having office at Rijim Plaza,
Morod, Mapusa, Bardez, Goa.

4. Shri Hanuman Bhiku Mayenkar,
major of age, businessman,

5. Miss Jyoti Hanuman Mayenkar,
aged 14 years, student,

6. Miss Pragati Hanuman Mayenkar,
aged 12 years, student,

7. Master Prakash Hanuman Mayenkar,
aged 9 years, student,
All residing at G-1, Shanta
Durga Apartments, Morod,
Mapusa, Bardez, Goa,

8. Shri Mohan Bhiku Mayenkar,
major of age, businessman,

9. Smt. Mohini Bhiku Mayenkar,

major of age, housewife,

Both residing at G-4 Shanta
Durga Apartment, Morod,
Mapusa, Bardez, Goa.

10. Smt. Manisha Ravindra Gadekar,
major of age, housewife,

11. Shri Ravindra Devu Gadekar,
major of age, both residing at
S-1, Shanta Durga Apartment,
Morod, Mapusa, Bardez, Goa.

12. Shri Ramesh Laximan Mayenkar,
major of age,

13. Miss Rekha Ramesh Mayenkar,
aged 10 years, student,
Both residing at House No.280,
St.Inez, Panaji, Tiswadi, Goa.

14. Smt. Laxmi Narayan Nemlekar,
major of age, housewife,

15. Shri Narayan Bhikaji Nemlekar,
major of age, service, both
residing at B 5 - Telecom,
Quarters, Ansabhat, Mapusa, Goa. .... Respondents.

Mr. Valmiki Menezes, Advocate for the petitioners.

Mr. R.S. Parsenkar, Advocate for the respondents.

CORAM : F.I. REBELLO, J.

DATE : JULY 10, 2003

ORAL JUDGMENT :

Rule. Respondents No.1, 2(a) to 2(c) waive service. Respondents No.3 to 15 are formal parties in so far as the relief is concerned though they are parties in the suit and, as such, their interest would not be affected. Hence, notices on them are dispensed with.

2. Respondents No.1 and 2 had filed a suit being Regular Civil Suit No.188/99 against the petitioners herein, who were the defendants No.2 and 3. The record shows that the summons were directed to be issued on the defendants on 3.11.1999. Respondent No.3 who is defendant No.1 in the suit, filed written statement on 11.11.1999. On behalf of the present petitioners herein, time was sought to file written statement and the matter was adjourned on various dates for filing the written statement. On 21.12.2000, an application was moved by the petitioners herein under Order 7, Rule 11 of C.P.C. Thereafter, in terms of the Roznama entries maintained, the matter was adjourned for hearing and disposing of the said application which finally came to be disposed of on 24.12.2002. The said application was marked as Exhibit-8. The Roznama would further show that from 27.12.2000, the trial Court did not extend time for filing the written statement. On 18.1.2003, i.e. the next date on which the matter was posted after passing order on Exhibit-8 on 24.12.2002, the petitioners herein by an application sought to file the Written Statement on record. The contesting respondents filed their reply on 15.2.2003. The learned trial Court was pleased to reject the application taken out by the petitioners. That is the subject matter of challenge in the present Writ Petition.

By the said order, the learned trial Court observed that the written statement is sought to be filed after the statutory period of 30 days as per the Amendment of 2002 in the Code of Civil Procedure and even after the outer limit of 90 days long since passed. In these circumstances, rejected the application, without taking written statement on record and consequently, dismissed the application.

3. At the hearing of the petition, on behalf of the petitioners, it is contended that the trial Court was hearing and disposing of the application under Order 7, Rule 11, which was an application moved even before the amendment to the C.P.C. had come into force. The application under Order 7, Rule 11 was, thereafter, heard and that the order finally came to be passed on 24.12.2002. During all this period, the trial Court did not extend time to file written statement, but only adjourned the matter for hearing for disposal of Exhibit-8. On the very next date, after disposal the petitioners herein applied to file written statement. In these circumstances, it is contended that it was within the jurisdiction of the trial Court to have entertained the application for filing written statement. The trial Court having failed to do so, has failed to exercise the jurisdiction vested in it in law and, consequently, the

order is liable to be set aside.

On the other hand, on behalf of the contesting respondents No.1 and 2, it is contended that the written statement is clearly beyond the period prescribed under Order 8, Rule 1, read with Order 5, and in these circumstances, the order passed by the trial Court is within jurisdiction. The order does not suffer from any error apparent on the face of the record and consequently, no interference is called for. Reliance is placed on the Judgment of the Apex Court in the case of **Dr. J.J. Merchant and ors. v. Shrinath Chaturvedi, (2002) 6 SCC 635,** wherein a similar provision in the Rules framed under the Consumer Protection Act, 1986, came up for consideration.

4. Having heard the Counsel, the real issue would be whether on facts and circumstances of the present case, the trial Court has failed to exercise the jurisdiction vested in it and whether the order discloses an error apparent on the face of the record. On a suit being filed, summons have to be issued to the defendants by the Court. While considering the issue, which is in issue, provisions of the Code of Civil Procedure (Amendment) Act, 1999 and the Code of Civil Procedure (Amendment) Act, 2002 will have to be considered. The Amendments came into effect from

1.7.2002. Order 5, Rule 1, before its amendment, by Act of 1999, did not provide for any time limit for filing the written statement. After the amendment, Order 5, Rule 1 read as under:

> " (1) When a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and to file the written statement of his defence, if any, on such day within thirty days from the day of institution of the suit as may be specified therein:
>
> Provided that no such summons shall be issued when a defendant has appeared at the presentation of plaint and admitted the plaintiff's claim:
>
> Provided further that where the defendant fails to file the written statement on the said day, he shall be allowed to file the same on such other day which shall not be beyond thirty days from the date of service of summons on the defendant, as the Court may think fit."

The next relevant Rule to be considered is

Order 8, Rule 1. Before the 1999 amendment, again there was no time frame within which a defendant was directed to file written statement. Order 8, Rule 1 which came to be substituted by the Act of 1999, read as under:

> "1. Written statement. - The defendant shall at or before the first hearing or within such time as the Court may permit, which shall not be beyond thirty days from the date of service of summons or the defendant, present a written statement of his defence."

Section 32 is a provision pertaining to repeal. In so far as Section 32,(2),(j) of the 1999 Amendment Act, the same reads as under :

> "(j) the provisions of Rules, 2, 6, 7, 9, 9-A, 21, 24 and 25 of the Order V of the First Schedule as amended or, as the case may be, inserted or omitted by Section 15 of this Act, shall not apply to any summons issued immediately before the commencement of section 15;"

Similarly, Section 32(2)(l) reads as under :

" the provisions of rules 1 and 1-A of Order VIII of the First Schedule, as substituted or inserted by section 18 of this Act, shall not apply to a written statement filed and presented before the Court immediately before the commence of section 18;"

We then have Amendment Act of 2002 which again substituted Order 5, Rule 1 which substituted Orver V, Rule 1, of the Amendment Act of 1999 by the following sub-rule :

"When a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and to file the written statement of his defence, if any, within thirty days from the date of service of summons on that defendant.

Provided that no summons shall be issued when a defendant has appeared at the presentation of plaint and admitted the plaintiff's claim.

Provided further that where the

defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons."

Similarly, by Section 9 of the Amendment Act of 2002, Order 8, as amended by Section 18 of the Amendment of 1999, was substituted. Rule 1 as substituted reads as under:

" The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:

Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons."

Section 16 is a repealing provision. It does not refer to Order 5 or Order 8 as substituted.

Section 1(2) sets out that it shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of the Act and for different States or for different parts thereof. Both the Amendment Acts were notified and came into force from 1.7.2002.

5. Admittedly the suit was not filed on or after 1st July, 2002, but was pending before the Court before 1.7.2002. In these circumstances, it will have to be considered whether the Amendment to Order 5, and Order 8 would apply in so far as pending suits are concerned. It may be clarified that so far as the Amending Act of 1999 is concerned, as already noted, those provisions shall come into force on the date to be notified. Order 5 of Rule 1 and Order 8 of Rule 1, however, came to be substituted by Amendment Act of 2002. The repealing provision does not provide for any saving. Section 1 of the Amendment Act provides that it will come into force on such date as may be notified. In the instant case, on 1.7.2002, in these circumstances, the Court will have to address itself to the question whether the amended provisions of Order 5,

Rule 1 and Order 8, Rule 1 will apply to suits which were pending. The question really is whether in cases of pending proceedings where written statement is not filed, is there jurisdiction in the Court to grant time beyond the period prescribed. Attention has been invited to a Judgment of a Single Judge of this Court sitting at Nagpur in Writ Petition No.4219 of 2002. That was a suit filed under the Hindu Marriage Act, 1955. The suit seems to have been filed before the Amendment Act came into force. Section 21 of the Hindu Marriage Act 1955 provides that all proceedings under the said Act shall be regulated, as far as may be, by the Code of Civil Procedure. It is in that context that the learned Judge considered Order 8, Rule 1 and held that the written statement has to be filed in terms of the mandate and it is to be strictly complied with. The real controversy is whether it would apply to pending proceedings, was really not answered.

6. It is a cardinal rule of our jurisprudence that procedural provisions are not meant to thwart the course of justice, but to advance it. Keeping those objectives in mind, the Court will have to consider whether and to what extent the provisions of the Code of Civil Procedure, in so far as filing of the written statement is concerned, have to be read as mandatory or directory. It is no doubt true that filing of written

statement is a step in the proceedings. The relevant orders reproduced would indicate that it was the intention of Parliament that the provisions have to be read together. In the first instance, in the matter of filing of the written statement one will have to consider the provisions of Order 5, that is the provision under which the Court is bound to issue summons to the defendant calling upon him to file the written statement. Under Order 5, as substituted by the Amendment Act of 2002, it is the duty of the Court while issuing summons to call upon the defendant to file written statement within 30 days from the date of service of summons on the defendant. There is a further proviso which sets out that if the defendant failed to file written statement within 30 days, he shall be allowed to file the same on such other day as may be specified by the Court, for the reasons to be recorded in writing, but which shall not be later than 90 days from the date of service of summons. In other words, there is a mandatory duty cast on the Court while issuing summons to bring it to the notice of the defendant to file written statement within thirty days or within the extended period of 90 days. We then have the proviso of Order VIII, Rule 1 for filing of written statement. The terminology of Order 8, Rule 1 is similar to that in Order V, namely that the defendant, shall within thirty days from the date of service of

summons on him, present a written statement of his defence. The proviso is similar. The Court, in its discretion, can extend the time not later than 90 days from the date of service of summons. The rule as amended, therefore, provides for a mandatory duty on the Court to notify the defendant that he has to file a written statement within 30 days of service of summons and further provides that the Court has jurisdiction in such an event to extend it at any rate not beyond 90 days period. The reading of the provision would, therefore, show that unless summons in terms of Order 5, Rule 1 has been served on the defendant calling upon him to file written statement within 30 days, it will not be possible to read in Order 8 that the defendant has to file written statement within 30 days or within the extended period of 90 days from the date of service of summons. If that be so, it will be open to the Court to either call upon the defendant to file written statement within 30 days or extended period of 90 days and only after such direction, the Court would cease to have jurisdiction to exercise discretion to extend time. In other words, unless a party is notified by the Court that he has to file the written statement within 30 days or extended period of 90 days, there will be discretion in the Court to permit filing of the written statement even beyond the extended period of 90 days, if the suit was instituted before coming into

force of the Amendment Act of 2002. The learned Single Judge sitting at Nagpur has not taken note of the provisions of Order 5. It may also be necessary to refer to the amended provisions as contained in the Act of 1999, and more specific Section 32 (j) and (l) which provides that they shall not apply to summons already issued and written statement already filed. In other words, the summons, in terms of the amendment, need not have been served. However, that Rule was substituted by the Act of 2002. The Amendment Act of 2002 does not provide for any such saving, as was provided in so far as Act of 1999 is concerned. The Amendment of 1999 was already law and had become a part of the C.P.C. and consequently, would have been made applicable if notified. Before its notification, by Act of 2002, it came to be substituted. The Amendment Act of 2002 also has a repealing provision. The repeal clause did not cover the new substituted Order V, Rule (1) or Order VIII, Rule (1), unlike what was provided in the Act of 1999. It is, therefore, clear that in so far as Act of 1999 is concerned it could have been construed that summons need not have been served as required under the Act of 1999, in respect of pending suits, but that would not be the position under the Act of 2002 as Section 32 of the Amendment Act of 1999 will not apply to in so far as the amendment brought about by the Act of 2002. My attention was invited to the Judgment of

the Apex Court in the case of **Dr. J.J. Merchant and Others vs Shrinath Chaturvedi, (2002) 6 SCC 635.** There the Apex Court was considering the provisions of the Consumer Protection Act, 1986. It is again a rule of interpretation that even an interpretation of cognate legislation need not be necessarily be followed unless they are in **pari materia** and considering the object of the statute. There are similar provisions, under the Industrial Disputes Act, 1947. Rule 10-B, sub-Rule (2) of the Central Rule, provides that after statement of claim is furnished to the other side raising the dispute, the Tribunal shall fix the first hearing on a date not beyond one month from the date of receipt of the order of reference and the opposite party or parties shall file their written statement together with documents, and that a list of witnesses within a period of 15 days from the date of first hearing and simultaneously forward a copy thereof to the other party. This rule has never been construed as mandatory. On failure to file the written statement within 15 days from the date of first hearing and simultaneously forwarding copy to the other party, it is left within the discretion of the Tribunal to grant such time in the interest of justice.

Reverting back to the Judgment of the Apex Court in the case of Dr. J.J. Merchant and others

(supra), Section 13 of the Consumer Protection Act also provides for filing written statement within a period of thirty days. But the Apex Court has read the said provision as :

> "Under this Rule also, there is a legislative mandate that written statement of defence is to be filed within 30 days. However, if there is a failure to file such written statement within the stipulated time, the court can at the most extend further period of 60 days and no more. Under the Act, the legislative intent is not to give 90 days of time but only maximum 45 days for filing the version by the opposite party. Therefore, the aforesaid mandate is required to be strictly adhered to."

In my opinion, therefore, both rules will have to be read together and so read, Order 5, Rule 1 and Order 8, Rule 1 will not apply to proceedings filed before the Amendment Acts came into force.

In **Salem Advocate Bar Association, Tamil Nadu vs. Union of India, AIR 2003 SC 189**, the Apex Court has gone into issue of various amendments brought

to the Code of Civil Procedure. However, neither Order 5, R.1, nor Order 8, Rule 1 has been the subject matter of the said suit.

7. The object of the Amendment Act, however, should not be frustrated. It is ultimately enacted with an object to avoid delays and to see to it that the written statements are filed as expeditiously as possible to give effect to the object of speedy justice and at the same time not to deny a fair opportunity to the litigant. In respect of pending proceedings, as held, Order V, Rule (1) would not apply. If that be the case, as summons was not served in terms of the Amended Order V, Order VIII, Rule (1) will not apply to pending proceedings. However, in such cases, it will be open to the Court to direct the party to file the written statement within the time as contemplated by the amended provision of Order 8, Rule 1 and if the party does not file within such time or at any rate, within the extended period of 90 days, then only the Court can reject an application for filing written statement.

8. In the instant case, the trial Court did not proceed to direct the defendants to file written statement after the application under Order 7, Rule 11 was taken out. Thereafter, the matter proceeded for

considerable period of time without the party being notified that he was bound by the mandate of Order 5, Rule 1. In these circumstances, in my opinion, the rights of such parties or other such parties should not be defeated.

In the instant case, considering the rule as now contained the position would be that, it was within the jurisdiction of the Court to extend the time, as the party was not notified that he has to file written statement within the period 30 days.

In the instant case, after disposal of the application under Order 7, Rule 11, the petitioners applied for filing their written statement. That was rejected. In my opinion, the learned trial Court clearly committed an error apparent on the face of the record, considering that at no point of time the petitioners were informed that they had to file their written statement within 30 days or the extended period of 90 days.

For the reasons aforesaid, the following order:

The petition is allowed. Rule made absolute in terms of prayer Clause (a). The petitioners are directed to file their written statement within 4 weeks

from today. Rule accordingly. There shall be no order as to costs.

F.I. REBELLO, J.

ssm.